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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 137.

THIRD NATIONAL BANK IN NASHVILLE,
Petitioner,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR PETITIONER, THIRD NATIONAL BANK IN NASHVILLE.

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Statute Cited.

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The Petitioner, Third National Bank in Nashville, has heretofore, on June 3, 1946, filed a petition for a writ of certiorari in this cause. Counsel for the respondent, Federal Savings and Loan Insurance Corporation, have filed a brief herein in opposition to the petition for certiorari. The petitioner desires now to reply to the brief and argument submitted on behalf of the Federal Savings and Loan Insurance Corporation, and for that purpose submits the following reply:

This suit was instituted by the respondent, Federal Savings and Loan Corporation, against this Petitioner—

Third National Bank in Nashville—seeking a judgment for $32,051.35 for money embezzled by one Virgil Hall, allegedly with the help of petitioner, from a local savings and loan association located in Nashville, Tennessee. The respondent—the plaintiff—reimbursed the local Association because the plaintiff was an insurer of the accounts owned by the shareholders in the local Association, **and the plaintiff took from the Association an assignment of the claim it might have against either Hall or the Third National Bank.**

QUESTION INVOLVED.

The defendant Bank insists that the controversy did not arise under the laws of the United States, and that the Federal Courts have no jurisdiction.

The respondent (hereinafter called Insurance Corporation) states in its brief before this Court that the "question presented" is

> "Whether the district courts of the United States have jurisdiction to entertain a suit for damages brought by the Federal Savings and Loan Insurance Corporation, where the amount involved is over $3,000.00 and the Corporation's claim arises out of acts of the defendant which, it is alleged, are violative of Section 512 (e) of the National Housing Act, 48 Stat. 1246, 1255, as amended, 52 Stat. 25, 12 U. S. C. 1731 (e)."
>
> (Respondent's Brief p. 2.)

We do not agree that the above statement presents accurately the question that is now before this Court upon the petition for certiorari. The amount involved is not a question. It is conceded that it is over $3,000.00. We submit that the real question is:

Whether the plaintiff's cause of action—the controversy—arises under the laws of the United States;

And, applying that test to the facts alleged in the present suit, the question is:

Whether plaintiff can sue in a Federal Court for money paid by plaintiff to indemnify a local savings association for loss through embezzlement, upon the allegation that the claim of the Association had been assigned to the plaintiff, and upon the allegation that defendant Bank made false statements to the plaintiff which contributed **to the Association's loss** and the allegation that such statements were a violation of a Federal Act; 12 U. S. Code 1731 (e).

According to the Complaint, the wrong was done **to the local association.** The damage was sustained **by the local association.** The right of action, therefore, was caused by and **arose** out of the embezzlement, and not under any Federal law. The plaintiff paid out its money because it was obligated to pay, if an embezzlement occurred—if a cause of action arose.

The plaintiff did not have a right of action against the defendant Bank separate from the cause of action accruing to the Association from the embezzlement. The Association could not recover $32,057.35, and the plaintiff another $32,051.35. If the alleged false statements of the Bank caused any damage, the damage was caused to, and the loss sustained by, the local Association.

The plaintiff paid the Association because the statute requires it to make a contribution to the Association (or liquidate it) after a loss occurs. The plaintiff was obligated to pay the Association's loss regardless of the cause. If the Association had lost $32,051.35 through bad investments, on account of floods, or for other causes, the plaintiff's obligation would have been the same—to liquidate the Association, or to make a contribution.

The point we are making is that there is only one cause of action, and that this one controversy stems from the embezzlement, and not from any Federal act.

The Federal Act prohibiting the making of false statements to plaintiff [12 U. S. Code 1731 (e)] did not create a new cause of action, and the construction of the Federal Act is not necessary for the determination of this case.

The controversy came into being as soon as the embezzlement was accomplished, wholly independent of the Federal Act. The cause of action arose and accrued to the local association **at that time**, and it accrued to plaintiff when the plaintiff paid the money to the association and accepted the assignment.

THIS SUIT BASED ON THE ASSIGNMENT.

Even if the Federal Act created a separate cause of action and even if the plaintiff should have a separate right of action against defendant under the Act, this suit is definitely based upon the assignment of the right of action from the association and has nothing to do with the Federal Act. The amendment to the complaint says:

> "The payment of the sum of $32,361.47 to the Fidelity Federal Savings and Loan Association by the plaintiff corporation fully restored the plaintiff on account of the cash shortage or sums wrongfully abstracted by Virgil Hall although the Fidelity Federal Savings and Loan Association suffered business losses which were determined when the affairs of the Association were audited as of the examination dated February 1, 1941."
>
> . . . . . .
>
> "The said sum of $32,361.47 paid by the plaintiff corporation to the Association on the ... day of March, 1941, at which time the Association entered into an agreement with the corporation and, as pro-

vided in this agreement, thereafter the Association assigned all of its right, title and interest, and chose in action and right of action against the Third National Bank to the plaintiff corporation. . . ."

Record, page 75.

The opinion of the Circuit Court of Appeals, in describing the nature of the case, stated that the accounts of the local association were insured by plaintiff; that defendant Bank, pursuant to a fraudulent arrangement with Virgil Hall, made fraudulent charges against the bank account of the Association, and made false statements to plaintiff's examiners to conceal the embezzlements. The opinion further stated:

". . . that in observance of the duty imposed upon the plaintiff by the National Housing Act to prevent default by the Association, and in the exercise of the discretion conferred by the Act to preserve normal operations of the insured institution as well as to protect itself as its insurer, the plaintiff restored the capital of the Association by advancing to it the amount so wrongfully converted by the defendant; and in consideration thereof the Association assigned and transferred to the plaintiff all its claims and rights of action against the Bank on account of the wrongful acts alleged."

Record p. 176;
Petition for Certiorari p. 27.

RESPONDENT'S BRIEF IN THIS COURT.

Respondent apparently concedes that its suit is brought to recover money embezzled from the local Association, and that the claim or right of action was assigned by the Association to the plaintiff.

Respondent's Brief, page 3.

The "Argument" in respondent's brief is based entirely upon the "Sixth Claim of Relief"—the amendment to the Complaint.

Brief of Federal Savings and Loan Corporation before this Court, page 7.

The sixth claim combines the first five claims. The first five claims are described in detail in the original complaint. They are all based upon allegations that funds were taken from the Association by improper charges against the bank account of the Association or by embezzlements from the Association by Hall.

First Claim (Record, page 5): An item of $10,000.00. An alleged illegal charge against the bank account of the Association.

Second Claim (Record, page 5): An item of $15,945.66. An alleged illegal charge by the Bank against the bank account of the Association.

Third Claim (Record, page 6): An item of $10,000.00. An alleged illegal charge by the Bank against the bank account of the Association.

Fourth Claim (Record, pages 7-12): An item of $11,456.83. An alleged defalcation in this sum by Hall from the Association. It is alleged that false representations made by the Bank to plaintiff made it possible for Hall to take this money from the Association.

Fifth Claim (Record, page 12): An item of $3,000.00. An alleged illegal transfer by Hall of a mortgage from the Association to the Bank.

Respondent refers to the sixth claim and argues as if it were a distinct cause of action, separate from the embezzlement of Hall and separate from the assignment of the claim of the Association. An examination of the sixth claim will show that it is a consolidation of the five prior claims and is based upon the embezzlement by Hall from the Association. The second paragraph of Claim Sixth states:

> "Plaintiff now having had access to certain records of the defendant bank through depositions taken since the declaration was filed not heretofore available, and from additional investigations made possible by these records, plaintiff sues the defendant bank in this claim of relief for the **entire shortage of Virgil Hall with the Association in the sum of $34,137.02.**" (Emphasis ours.)
>
> Record, pages 31-32.

The sixth claim then proceeds to describe the facts alleged in the prior claims to the effect that Hall embezzled funds from the Association with the help of the bank.

The whole tenor of the suit—the sixth claim and all others—is to collect the amount embezzled by Hall from the Association. The Association assigned this claim to the plaintiff, and, we submit, the right to collect back money embezzled is not dependent upon a Federal law, nor is the construction of a Federal law necessary for the decision of the case.

And the fact that the suit is not based upon the Federal law is borne out by the last paragraph of the sixth claim itself, which reads:

"Wherefore, this plaintiff, for itself, for the Fidelity Federal Savings and Loan Association, and in the alternative for the Fidelity and Deposit Company of Maryland, sues the defendant for $34,137.02 because and on account of the matters hereinabove set forth."

Record, page 52.

The Federal law relied upon by plaintiff gives the Fidelity Federal Savings and Loan Association no right of action or protection. The Federal law was not passed for the benefit of the Association, nor for the benefit of the Fidelity and Deposit Insurance Company.

No cause of action arose under the Federal law as far as the Association or the F. & D. Insurance Company is concerned. And yet the suit is brought for the plaintiff, "for the Fidelity Federal Savings and Loan Association, and in the alternative for the Fidelity and Deposit Company."

This, we submit, is conclusive of the fact that the suit is based and grounded upon the original claim of the Association which was assigned to the plaintiff.

The Association could not institute the suit in the Federal Court because it is domiciled in Tennessee.

The plaintiff could not institute the suit in the Federal Court by reason of citizenship because it is not a citizen of any particular state.

And the plaintiff should not be permitted to prosecute this suit in the Federal Court because the suit is based upon the common law of embezzlement, and it does not arise out of a Federal law, nor is the construction of a Federal law necessary to the determination of the liability of this defendant.

THE CASE OF BELL v. HOOD.

Respondent cites the recent decision in *Bell v. Hood*, No. 344, October Term, 1945, Advance Sheets of Vol. 90, Law Edition of U. S. Supreme Court Reports, page 758.

In that case the complaint is based solely upon a violation of the Fourth and Fifth Amendments. Mr. Justice Black said:

> "It cannot be doubted therefore that it was the pleaders' purpose to make violation of these Constitutional provisions the basis of this suit. Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States."

Applying this rule in the present case, the first three claims (amounting to more than $35,000.00) are illegal entries or charges made by the bank against the account of the Association. It was certainly the pleader's purpose to collect these items, and yet they have no reference to a Federal statute, and are not created or covered by a Federal statute.

The fourth claim is for fraud and deceit in that plaintiff was prevented from discovering earlier that Hall was embezzling funds from the Association. And the fifth claim had no connection with any misrepresentations to plaintiff or any Federal Statute.

In fact, it was on January 5, 1945—two years and four months after this suit was filed—that the plaintiff first thought about claiming that the defendant violated a Federal Act. On that date—after suit had been on file for over two years—the plaintiff, for the first time, claimed that the defendant had violated Title 12, U. S. C. A., Section 1731 (e).

Record, pages 136, 137.

We submit that it clearly appears in this case that the amendment of January 5, 1945—filed on the day that the question was being finally argued—was added as an afterthought, to cling to the jurisdiction which plaintiff felt was crumbling under him, and was insubstantial and frivolous, and "made solely for the purpose of obtaining jurisdiction."

And in the case of *Bell v. Hood* this Court said:

> "The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or Federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

The other cases cited and relied upon by respondent have been discussed in our original brief filed with our petition in this Court. Respondent mentions and cites two of the cases referred to by the Circuit Court of Appeals, namely, *Federal Savings and Loan Insurance Corporation v. Kearney Trust Co.* (C. C. A., Mo.), 151 Fed. 2d 720, and *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U. S. 210, 89 L. Ed. 187, 65 S. Ct. 235.

In the Kearney Trust Company case the Court did say that it was a case arising under the laws of the United States, but the only question involved was whether the rules of decision of the State or of the general law should apply. The question of Federal jurisdiction was never raised or discussed.

And as to the Tunstall case, we submit that the controversy was based strictly upon a right created by a Federal statute. If the Federal act had not been passed there could have been no lawsuit. The right of action clearly arose under the laws of the United States.

CONCLUSION.

We submit that respondent has produced no authorities or arguments that support the holding of the Circuit Court of Appeals on the question of jurisdiction. We submit that the lawsuit is in fact the lawsuit of the local Association against the defendant Bank, which has been assigned to the plaintiff, and that plaintiff should not be permitted to invoke and obtain Federal jurisdiction for suit on an assigned claim by adding to his complaint the allegation

> "That as one of the bases of its claim, plaintiff shows a violation by the defendant of Title 12, U. S. C. A., Section 1731 (e), in that the defendant for the purpose of influencing the action of the said plaintiff corporation made, or caused to be made, a statement, knowing the same to be false. Title 12, U. S. C. A., Section 1731 (e)."
>
> Record, page 137.

Respectfully submitted,

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Proof of Service.

A copy of this brief was sent by first class mail to all attorneys of record.

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